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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 22.

VERMILYA-BROWN COMPANY, INC., NECARO COMPANY, INC., and the ARTHUR A. JOHNSON CORP., doing business as BERMUDA BASE CONTRACTORS,

Petitioners,

—against—

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, JOSEPH JOHN GILROY, JOHN JOSEPH MORTIMER, JAMES F. McDONALD, PAUL F. NIETER, WILLIAM H. PARKER, JR., LOUIS AUGUST REHBERG, HOWARD L. SHOCK, JR., and DAVID JOSEPH TOWNSEND,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

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THE ALPERT PRESS — TRIANGLE 5-1058-1059

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

This is an action under the Fair Labor Standards Act of 1938 for overtime pay and damages due respondents from their employment by petitioners in the Area of the Island of Bermuda, leased by the United States from the British Government. The United States District Court for the Southern District of New York dismissed the complaint on petitioners' motion for summary judgment (R. 62-63) and

granted judgment to the petitioners. The judgment was reversed by the United States Court of Appeals for the Second Circuit (R. 73); and is before this Court on Writ of Certiorari granted on March 29, 1948 (R. 75).

QUESTION PRESENTED.

Whether the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. A. § 201, *et seq.*) applies to work performed by respondents in the Area of Bermuda leased to the United States by Agreement and Lease (55 Stat. 1560, *et seq.*) which work was done pursuant to contract made between the parties in the United States and is otherwise covered by the Act.

The respondents contend that, regardless of the nature of the sovereignty or the territorial or property interest acquired by the United States under that Agreement and Lease in that Area, the Fair Labor Standards Act is effective there and applicable to the work performed by respondents.

FACTS.

By agreement between the United States Government and the Government of Great Britain and Northern Ireland certain areas of the Island of Bermuda were leased to the United States (55 Stat. 1560 *et seq.*) "to hold unto the United States for a term of ninety-nine years" (55 Stat. 1577). The United States entered into a contract with the petitioners for the construction of Outlying Defense Bases on the Leased Area in Bermuda.

The building of these Defense Bases was an undertaking of enormous proportions. The affidavit of Robert Glenn, an employee of one of the petitioners (R. 13-15), indicates, in part, the magnitude of the work. The respondents were hired as patrolmen and firemen to police, guard and protect the divers activities of the petitioners in the Leased Areas (Affidavits in opposition to motion, R. 51-53).

Respondents were hired in New York City. Their contract of hire did not state the hours of employment; but each respondent at the time of hiring was given an instruction sheet which stated that the work-week would consist of 48 hours (R. 51). Once in Bermuda the respondents were required to work a 56-hour work-week, and overtime was paid to them at time and a half for each hour over 8 hours in any one day. Respondents claim that they were required to and did work at least 63 hours each week, and no claim is made for hours in excess thereof (R. 26, 41).

The scope and extent of the work of the respondents is set out in full in the affidavit of the respondent David Joseph Townsend (R. 51). In view of the enormity of the petitioners' undertaking, the respondents were required to patrol and protect, not only the construction work, but goods, merchandise, materials, equipment, tools, etc., which were loaded and unloaded on ships; stored on docks and elsewhere for reshipment; transferred on trucks from docks to the bases and from the bases to the docks; enormous amounts of supplies, as originally crated, and supplies and materials re-crated for shipment to other points or for return to the United States (R. 48, 49, 51-53). The duties of the respondents were to protect cargoes arriving and leaving, to protect materials and supplies destined for the construction work, to protect the goods and merchandise received and thereafter delivered to the stores and commissaries of the petitioners for re-sale to the local population (*ibid.*). The respondents' activities were directly concerned with transporting men, materials, merchandise and equipment to this Bermuda Area from the United States or other of the Leased Areas, and from this Bermuda Area to other bases and points, by reason of military secrecy, unknown to the respondents (*ibid.*).

On the way to Bermuda and on the return to the United States, some of the respondents, under the direction of the petitioners, patrolled and guarded merchandise and equipment of the petitioners on board ship (R. 20, 53).

STATUTES INVOLVED.

FAIR LABOR STANDARDS ACT OF 1938 (52 Stat. 1060, 29 U. S. C. A. § 201, *et al.*) was enacted for the purposes set forth in § 202 of the Act, as follows:

> **"§ 202. Congressional finding and declaration of policy.**
>
> "(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.
>
> "(b) It is declared to be the policy of sections 201-219 of this title, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

The Act is made applicable, with certain exceptions not here material, to any employee "who is engaged in commerce or in the production of goods for commerce" (29 U. S. C. A. §§ 206, 207).

Under the Act "Commerce" means

> "trade, commerce, transportation, transmission or communication among the several States or from any State to any place outside thereof." (29 U. S. C. A. § 203[b].)

"State" means

> "any State of the United States or the District of Columbia or any Territory or possession of the United States." (29 U. S. C. A. § 203[c].)

The Act provides for minimum wages (§ 206) and for maximum hours (§ 207) for employees so engaged and expressly provides that (§ 218):

> "No provision * * * of this title shall * * * justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable [under the Act]."

SUMMARY OF PERTINENT PROVISIONS OF LEASE AND AGREEMENT RELATIVE TO LEASED AREAS (55 STAT. 1560, ET SEQ.).

The Agreement between the contracting nations provides:

> "The United States shall have all the rights, power and authority within the Leased Areas which are necessary for the establishment, use, operation and defense thereof, or appropriate for their control, and all the rights, power and authority within the limits of territorial waters and air spaces adjacent to, or in the vicinity of, the Leased Areas, which are necessary to provide access to and defense of the Leased Areas, or appropriate for Control thereof." (Article I, 55 Stat. 1560.)

Significant of the comprehensive authority of the United States over "commerce" for the Leased Areas under the Agreement are the following provisions:

The Agreement expressly grants to the United States the right, power and authority (Article I(2), 55 Stat. 1561):

> "(a) to construct, maintain, operate, use, occupy and control the said bases;"
>
> "(d) to regulate and control within the Leased Areas all communications within, to and from the areas leased."

and the Agreement recognizes that the United States may "interfere with the necessary rights of navigation, aviation or communication to or from or within the Territories" * (Article I(3), 55 Stat. 1561).

In cases of crimes and offenses of a military nature or of any other offenses relating to the property and operation of the U. S. Government in the Leased Areas committed by U. S. service-men or nationals, British subjects or persons other than British subjects within the Leased Areas the (Article IV (1), 55 Stat. 1562)

> "United States shall have the *absolute right* in the first instance to assume and exercise jurisdiction with respect to such offense." (Italics supplied.)

A person charged with an offense under Article IV is to be dealt with by a United States Court and must be surrendered to the United States authorities if he is in the Territory* but outside the Leased Areas (Article VIII). The immigration laws of the Territory adjacent to the bases do not apply to the Leased Areas (Article XIII). United States postal facilities are to be established in the Leased Areas

* "Territory" as here used refers to all of Bermuda, not merely the Leased Area. See Art. XXX of the Agreement.

(Article XVI). No person in the Leased Areas serving or employed there can be subject to income tax or poll tax of the Territory adjacent to the bases (Article XVII). The Leased Areas are to *revert* to the "Lessor" only when abandoned by the United States with "notice of such abandonment." (Article XXI.)

Article XXIV of the Agreement (55 Stat. 1569) is significantly entitled "Possession" and states in part:

> "On the signing of this Agreement, leases of the Leased Areas * * * shall be forthwith executed, and all rights, power, authority and control under such leases and under this Agreement (*including transfer of possession* where it shall not previously have been transferred) * * * ." (Italics supplied.)

The Agreement does not specifically declare the Leased Area to be a "territory or part of the territory of the United States" but that expression is used in the Agreement in Article XI (4) (55 Stat. 1565):

> "(4) It is understood that a Leased Area is not a part of the territory of the United States for the purpose of coastwise shipping laws so as to exclude British vessels from trade between the United States and the Leased Areas."

And the *habendum* clause of the lease provides:

> "To HAVE AND TO HOLD the same for the full end and term of ninety-nine years * * *." (55 Stat. 1574).

OPINION OF CIRCUIT COURT.

The Circuit Court reversed the District Court and denied petitioners' motion for summary judgment. In its opinion (R. 65-73, reported in 164 F. (2d) 924), after consideration of the various provisions of the Lease and Agreement, and the scope of the grant to the United States, the Court stated (R. 68):

> "The cumulative effect of these various provisions compels the conclusion that the areas are subject to fully as complete control by the United States as obtains in other areas long known as 'possessions' of the United States."

The Court also held that the Federal Labor Standards Act was "broadly enough phrased * * * to cover American workmen at Bermuda bases, as fully as natives working in Samoa or Guam." (R. 69.)

As to the contention of petitioners, sustained by the District Court (R. 59-62, reported in 73 F. Supp. 860), that the question whether the Leased Area was a "possession" is a political one to be determined by the Executive or Legislative departments of Government, the Circuit Court held (R. 69-70):

> "Undoubtedly courts should avoid the determination of political issues, but it is difficult to see how this is such an issue. Before us is a matter of interpretation of an Act in issue between two groups of private parties. Obviously this arises in consequence of political acts, and those conceivably might have been of such precise form or exact agreement with a foreign state as to settle the question. But here they were not, and we must determine this private controversy, even if it arises as to areas affected by an agreement between nations. *Ex parte Cooper*, 143 U. S. 472, with full discussion at 499-503."

ARGUMENT.

POINT I.

THE FAIR LABOR STANDARDS ACT IS APPLICABLE TO THE LEASED AREAS, SINCE UNITED STATES HAS JURISDICTION AND CONTROL OF COMMERCE (AND CONSEQUENTLY OF CONDITIONS OF EMPLOYMENT IN SUCH COMMERCE) IN SAID AREAS. THEREFORE CONGRESSIONAL LEGISLATION WITH RESPECT TO COMMERCE WAS AUTHORIZED AND EFFECTIVE WITHIN THOSE AREAS.

In order that the issue here presented may be resolved it is necessary that it be placed in its proper setting.

The controversy here present involves labor performed by the respondents who were hired in the United States by the petitioners, American concerns, to perform labor in the Area leased to the United States in Bermuda, which were known to all of the parties to be under United States jurisdiction and control. Moreover at the time that the contracts were made and the labor was performed, the Fair Labor Standards Act was in effect. This Act represented a definite and settled American policy to establish minimum terms and conditions for labor in the interests of protecting the rights of labor and in the interests of promoting and establishing standards of business practice through the exercise of Federal power over interstate and foreign commerce (see, *supra* 29 U. S. C. A. § 202). This legislation indicates plainly an intention by Congress to extend to labor this basic protection concerning terms and conditions of labor, to the farthest reaches of Congress' power.

We are not here concerned with questions of international import respecting rights of sovereign powers against each other or possible intrusion of one power upon the rights or status of subjects of another power. This is a dispute between American subjects concerning their rights under an

American statute involving an American contract for carrying out an American governmental undertaking performed in a geographical area where the United States has jurisdiction and control. Before this Court is a controversy involving private rights, and this fact is not altered by the circumstance that the determination of those rights involves the interpretation of an Agreement and a Lease made between the United States and Great Britain.

It is in this framework that the issue in the present case must be set.

It is important to note that the question as presented by the petitioners in their brief (p. 2) is not correct and distorts the true question before this Court. The Circuit Court did not hold that the Leased Areas are "Territories and possessions" of the United States (in the sovereign sense of the words as the petitioners seem to imply) "with the consequence" that the Fair Labor Standards Act applied; but decided rather that within the grant of power granted to the United States by said Lease and Agreement in said Leased Areas the Federal Labor Standards Act was "broadly enough phrased" (R. 69) to cover the respondents working in the Bermuda bases.

It is difficult to see how the application of the provisions of an American statute to this dispute can possibly be of interest to any foreign power or how it could be considered an intrusion upon its sovereignty or affect this country's international relations with which the petitioners' and the Solicitor General's briefs are so expansively concerned. A realistic approach to what is here involved shows that the fine-spun technical questions concerning sovereignty and international relations which the State Department seeks to inject and to which the opposition briefs address themselves are unwarranted and far-fetched and have no real connection with the problem with which we are here concerned.

A. Congress Has Legislative Power Over Commerce in the Leased Areas.

The Fair Labor Standards Act is an exercise of the power of Congress over commerce. By the employment of this power Congress undertook to establish fair standards of working conditions for American workmen, "engaged in commerce" or "in the production of goods for commerce."

Tennessee Coal Co. v. *Muscoda Local*, 321 U. S. 590.

Moreover, as this Court has held,

> "* * * * It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." (*Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 567.)
>
> *Overstreet* v. *North Shore Corp.*, 318 U. S. 125;
>
> *United States* v. *Darby*, 312 U. S. 100, 115;
> *29 U. S. C. A.* § 202.

As this Court said in *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, 597:

> "* * * * [The provisions of the Fair Labor Standards Act], are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specifically legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner."

And work standards on public projects require the same protection. (See *Walling* v. *Patton-Tulley Transp. Co.* (C. C. A. 6th Cir.), 134 F. (2d) 945, 949.)

Whether the Fair Labor Standards Act applies in the Leased Area depends on whether the United States had con-

trol and power over commerce there, and if so, whether Congress intended that Act to be effective there.

Under the Act "Commerce" means

> "trade, commerce, transportation, transmission or communications among the several States or from any State to any place outside thereof." (29 U. S. C. A. § 203[b]); and

"State" means

> "any State of the United States or of the District of Columbia or any Territory or possession of the United States." (29 U. S. C. A. § 203[c].)

From the foregoing definitions, the Finding and Declaration of policy made by Congress and the holdings of this Court, it is clear that the application of the Act reaches wherever Congress has power to act with respect to "commerce";* such power ceases only when "commerce" comes within the domain of another government.

United States v. *Chicago M. Ry. Co.*, 149 Fed. 487.

Bearing this in mind, does Congress lose its power over commerce when such commerce is in the Leased Area of Bermuda? If Congress has no power over commerce in that Area then the control over the commerce in the Leased Area must be in Great Britain or Northern Ireland or Bermuda itself. Further, must the Courts await a formal declaration from the Congress or the Executive, that these Leased Areas are (political) possessions of the United States before Congress can control the commerce there, and before private

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* The cases cited in the opposing briefs, *McLeod* v. *Threlkeld*, 319 U. S. 491, and *10 E. 40th Street Co.* v. *Callus*, 325 U. S. 578, are not in point since they do not relate to the geographical extent of federal control but relate to the activities of the employees involved, whether they were "engaged in commerce" or "in the production of goods for commerce."

controversies can be settled? This declaration may never take place. During all this time is the control of commerce in a vacuum in these Leased Areas?

On repeated occasions this Court has determined the status of a geographical area for a particular case in determining whether that area was affected by a particular act of Congress, though no declaration had been made by Congress or the Executive. (See Pergler's *Judicial Interpretations of International Law*, Section 14, page 88, and cases cited; *De Lima* v. *Bidewell*, 182 U. S. 1.) The principle followed by the District Court that it is not within the province of courts to pass judgment upon the policy of legislative or executive action, is not applicable to the case at bar. That principle involves the rights of the Nation, "not individual rights." (Willoughby, *The Constitutional Law of the United States* (2d. Ed.), Vol. 3, p. 1326, *et seq.*) For, when

> "* * * private justiciable rights are involved in a suit, the court has indicated that it will not refuse to assume jurisdiction even though questions of extreme political importance are also necessarily involved.
>
> "Thus * * * treaties entered into by the United States not only bind the United States internationally, but creates municipal law for individuals so far as their personal rights and property are concerned. Thus a treaty, having been entered into the court will follow its terms even when, by doing so, it has to go counter to the position previously assumed by the executive department, or, indeed, contended for by the government in the case at bar.
>
> "In *Ex parte Cooper*, the court, after asserting the principle that it would not pass upon a matter purely political in character, was careful to say: 'We are not to be understood, however, as underrating the weight of the argument that in a case involving private rights, the court may be obliged, if

those rights are dependent upon the construction of acts of Congress or of a treaty, and the case turns upon a question, public in its nature, which has not been determined by the political departments in the form of law specifically settling it, or authorizing the executive to do so, to render judgment, since we have no more right to decline jurisdiction which is given than to usurp which is not given.'" Willoughy, *The Constitutional Law of the U. S., ibid*, p. 1336.

So whether the Fair Labor Standards Act applies in the Leased Area of Bermuda will depend upon whether under the provisions of the Agreement and Lease, even though it is "public in its nature, which has not been determined by the political departments" (*Ex parte Cooper*, 143 U. S. 472, 503) United States has control over "commerce" there. The lease and agreement controls, it is submitted, even though the Congress or the Executive may take or have taken a position opposite to the express terms and meaning of the Agreement and Lease. Cf. *Rassmussen v. United States*, 197 U. S. 516.

The examination of the Lease and Agreement (55 Stat. 1560, *et seq.*) shows clearly that control of commerce in the Leased Area of Bermuda was yielded to and is vested in the United States. Under Article I of the Agreement the United States is given all necessary power "to provide access to and defense of the Leased Areas." Under Article II, (2) (*d*) the United States possesses the express right "to regulate and control within the Leased Areas all communications within, to and from the areas leased." The control of commerce in the Leased Area is so strongly vested in the United States by the Agreement that it has the right to interfere with the commerce of the adjoining Territories not leased (Article I, [3].)

Hence the United States had control over commerce in the Leased Area from the time the Lease went into effect, and there would be a suspension of any control over commerce

in the Area, unless the United States be regarded as having exercised that control. Actually (though not part of the record) there is no doubt that since the inception of the Lease, United States controlled such commerce.

Congress has power to legislate concerning commerce in the Leased Area not only by virtue of the provisions of the Agreement and Lease, but also by virtue of Article IV, Section 3, Cl. 2 of the Constitution, which provides:

> "The Congress shall have Power * * * to make all Rules and Regulations respecting Territory and other Property belonging to the United States."

The rights acquired by the United States under the said Lease are obviously "Territory and Property belonging to the United States." Hence under the Constitution, Congress has the right and power to legislate concerning commerce and other matters within that Area.*

Indeed Congress has actually recognized this right and has legislated in this Area in the matter of Workmens Compensation (55 Stat. 622), damage of property against enemy attack (56 Stat. 174) and jurisdiction of Navy Courts (57 Stat. 41). (See Petitioners' Brief, pp. 37-42.)

The opposing briefs admit Congress has power to enact the foregoing legislation affecting the Leased Areas; yet, the basic argument of the opposition against the application of the Fair Labor Standards Act in the Leased Areas is that since the United States lacks sovereignty over such Areas, Acts of Congress cannot be effective there. Still, they recognize the right and power in Congress to legislate specifically for the Area.

The only difference between these laws enacted by Congress to apply specifically to the Leased Areas and the Fair

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* "The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory *or other property* belonging to the United States. It would be absurd to hold territory, and no power to govern it when acquired." *Mormon Church v. United States*, 136 U. S. 1, 42. (Italics supplied.) See also *Hoover & Allison Co. v. Evatt*, 324 U. S. 652, 673.

Labor Standards Act is that the former in express terms name the Leased Areas while in the latter no direct mention is made of the Leased Areas. This, then, is merely a matter of Congressional intent concerning the area in which the legislation should be effective and not a question of sovereignty. So, if Congress intended that the Fair Labor Standards Act should cover all areas within its jurisdiction and control that Act would perforce apply in the same manner as other enactments. If, however, sovereignty were a necessary prerequisite for making the Fair Labor Standards Act effective there, the same prerequisite would also be required for all other enactments.

As already indicated the purpose of the Fair Labor Standards Act is to extend federal control to the "farthest reaches" of commerce. Once goods enter the channels of federal commerce, control by Congress over their movement is preserved until such federal control is ended.

Walling v. *Jacksonville Paper Co., supra;*

McComb v. *Herlihy* (C. C. A., 4th Cir.), 161 F. (2d) 568.

Once the power of Congress attaches to commerce it does not cease until interstate or foreign commercial intercourse ends. (*Carter* v. *Carter Coal Co.*, 298 U. S. 238.) And that control of Congress continues and exists over commerce in the Leased Area of Bermuda by reason of the commerce clause and the power of Congress over territories and property belonging to the United States.

B. Fair Labor Standards Act Applies Even Though Enacted Prior to Acquisition of Leased Area.

We have demonstrated that Congress has full authority concerning commerce in the Leased Area, as "Territory or Property belonging to the United States" and by virtue of the provisions of the Lease and Agreement. We have also shown that the Fair Labor Standards Act is a Congressional

enactment for the regulation of commerce intended to extend to every area of federal control of commerce for the purpose of safeguarding and promoting the twin objectives of fair labor standards and of fair business practices (29 U. S. C. A. § 202, *Tennessee Coal Co.* v. *Muscoda Local, supra*). Hence this Act should be effective in the Leased Area unless there is any other basis for objection. The opposing briefs urge that the Act cannot apply because it was enacted prior to the acquisition of the Leased Area and special legislation by Congress would therefore be required to make it applicable.

This Court has set down the rule for determining the efficacy of a federal statute as applied to territories or possessions subsequently acquired by the United States in *Puerto Rico* v. *Shell Co.*, 302 U. S. 253. In that case this Court considered whether the Sherman Anti-Trust Act of 1890 was applicable in Puerto Rico upon its acquisition ten years thereafter. This Court said at p. 257:

> "Section 3 of the Sherman Act extends to 'any territory of the United States.' But it is urged that Puerto Rico cannot be brought within the intent of this phrase, and, therefore, the section does not apply to that dependency. The point is not well made. When the Sherman Act was passed (1890), we had no insular dependencies; and, necessarily, the application of § 3 did not extend beyond our continental domain; and, undoubtedly, it was this domain which was in the immediate contemplation of Congress. Certainly, Congress at that time did not have Puerto Rico in mind. But that is not enough. *It is necessary to go further and to say that if the acquisition of that insular dependency had been foreseen, Congress would have so varied its comprehensive language as to exclude it from the operation of the act.* *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 644; *Takao Ozawa* v. *United States*, 260 U. S. 178, 195-196; *United States* v. *Thind*, 261 U. S. 204, 207-208. The

> only question, therefore, is whether the word 'territory,' as used in § 3 of the Sherman Act, properly can be applied to a dependency now bearing the relation to the United States which is borne ~~by Puerto Rico.~~" (Italics supplied.)

In applying the rule thus stated and determining whether Congress would have excluded Puerto Rico had it foreseen its future acquisition, this Court considered the purpose and objectives sought to be obtained by the Sherman Act and concluded that the Act was applicable to Puerto Rico, saying at p. 259:

> "With equal force, it may be said here that there is no reason why Puerto Rico should not be held to be a 'territory' within the meaning of § 3 of the Sherman Act. We pointed out in the *Atlantic Cleaners & Dyers case, supra* (p. 435), that in the light of the applicable history and circumstances, it was apparent that Congress meant to deal comprehensively with the subject of contracts, combinations, and conspiracies in restraint of trade, 'and to that end to exercise all the power it possessed'; that while Congress in passing §1 exercised only the power conferred by the commerce clause, in passing § 3 it exercised a general power, unlimited by that clause. We therefore concluded that the word 'trade' as used in § 3 should be given a more extended meaning than the same word as used in § 1.
>
> "If, as we there determined, *Congress intended by the Sherman Act to exert all the power it possessed in respect of the subject matter,—trade and commerce,—it is equally reasonable to conclude that Congress intended to include all territories to which its powers might extend.* The same reason which requires the utmost liberality of construction in respect of the word 'trade,' also requires the same degree of liber-

> ality of construction in respect of the word 'territory'; and we hold, accordingly, that the word 'territory' was used in its most comprehensive sense, as embracing all organized territories, whether incorporated into the United States or not, including Puerto Rico." (Italics supplied.)

See:

National Labor Relations Board v. *Gonzales Padin Co.* (C. C. A. 1st Cir.), 161 F. (2d) 353, 355;

Cases v. *United States* (C. C. A. 1st Cir.), 131 F. (2d) 916, 923, Cert. Den. 319 U. S. 770;

Crespo v. *United States* (C. C. A. 1st Cir.), 151 F. (2d) 44, 45, Cert. Dis. 327 U. S. 758.*

In the case of *Ozawa* v. *United States*, 260 U. S. 178, this Court said at page 194:

> "It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance; but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason for the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail."

The purposes and objectives of Congress in respect to the Fair Labor Standards Act are as comprehensive in scope

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* Compare the recent case of *Filardo* v. *Foley Bros., Inc.* (1948), 297 N. Y. 217, where the Court of Appeals held that the Federal Eight Hour Law applies to laborers on government construction work in a foreign country.

and coverage in respect of protection of labor standards in "commerce" as is the Sherman Act of business and trade standards in "commerce." It is therefore equally reasonable to conclude here as this Court concluded in the case of *Puerto Rico* v. *Shell Co., supra,* that Congress intended by the Fair Labor Standards Act "to exert all power it possessed in respect of the subject matter" and "to include all territories to which its powers might extend." Certainly it can not be suggested that the protection and promotion of fair labor standards (the subject of the Fair Labor Standards Act) was not intended by Congress to be as deserving of the benefits of the exercise of the full plenary power of Congress as was the protection and promotion of fair trade practices (the subject of the Sherman Anti-Trust Act).

In two New York cases squarely dealing with the question before this Court, each held the act applicable. *Eckert* v. *Elmhurst Contracting Co.*, 185 Misc. 108, 56 N. Y. S. (2d) 98, aff'd 186 Misc. 100, 61 N. Y. S. (2d) 730; *Croce* v. *Elmhurst Contracting Co.*, 74 N. Y. S. (2d) 445, aff'd — App. Div. —, 79 N. Y. S. (2d) 876.

We have shown that Congress has authority to legislate in the Leased Area in the field covered by the Fair Labor Standards Act both by virtue of the "Territory and Property" and "commerce" clauses of the Constitution as well as the provisions of the Agreement and Lease granting to the United States the control of commerce in the Leased Area; that by that Act, Congress intended to exercise its plenary powers of federal control over commerce for purposes of protecting the rights of labor and the elimination of unfair business practices; it therefore follows that regardless of the nature of the sovereignty or the territorial or property interest acquired by the United States over these Leased Areas, the Fair Labor Standards Act is effective thereto and applicable to the work performed by the respondents.

POINT II.

THE LEASED AREA IN BERMUDA FALLS WITHIN THE EXPRESSION "TERRITORY AND POSSESSION" OF THE FAIR LABOR STANDARDS ACT.

The main argument of the petitioners is on the contention that the Fair Labor Standards Act does not apply since the Leased Area is not in a "Territory or possession" of the United States within the definition of "State" in the Act. They contend that term "Territory or possession" is a "phrase of art" intended to cover Areas which were acquired by absolute grant or conquest and over which there is absolute sovereignty—that it does not include territory acquired by the United States short of absolute grant.

We have already shown that it is not necessary for the United States to have absolute sovereignty over the Leased Area in order to make the Fair Labor Standards Act applicable, nor to determine the question of sovereignty over the Leased Area to determine the issue in the case at hand. However, we believe that there is no reasonable basis for the point urged by the opposing briefs that the Leased Areas are not included within the general descriptive words, "Territory and possession" of the Act.

A.

At the outset it is important to recognize that the narrow interpretation that the petitioners attempt to give the terms, "Territory and possession" results in permitting the increase of hours of employment beyond the standards set in the Fair Labor Standards Act. Such an interpretation of the Act is contrary to the express words of the statute that no provision of the Act shall (29 U. S. C. A. § 218)

> "* * * justify any employer increasing hours of employment maintained by him which are shorter than the maximum laws applicable [under the Act]."

The opposition admit that there has never been a precise definition of the phrase "Territory and possession" and

assert that it should be given its ordinary meaning, which they contend is the narrow interpretation they urge.

In the Constitution the phrase "Territories and possessions" does not appear. The Constitution does specifically treat of the "Territory or Property belonging to the United States" (Art. IV, Sec. 3, cl. 2). In respect to this clause this Court, in *United States* v. *Gratiot, et al.*, 14 Peters 526, said (at p. 529):

> "* * * The term 'territory' as here used, is merely descriptive of one kind of property, and is equivalent to the word 'lands.' And Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitation. * * * "

It can hardly be contended that lands acquired by lease are not "Territory or Property belonging to the United States" within the view here expressed by this Court. Aside from this, taking the ordinary meaning of the phrase, "Territories or possessions" would quite clearly include any "lands" over which the United States has control, under a lease. It is difficult to see how a 99-year lease could be excluded from the phrase "Territory or possession" giving the phrase its ordinary meaning. (See also, opinion below, R. 69.)

Petitioners seek to rely upon the fact that in the administration of the Act, the Wage and Hour Division did not specifically include the Leased Areas. In the first place, it cannot be said that the Wage and Hour Division intended to exclude the Leased Area. This is clear from the answer made by the Wage and Hour Division to a direct inquiry on this very point (R. 55; 1946 Wage and Hour Cases 1276) where they said in part:

> "An examination of the legislative history of the Act relative to the meaning of the phrase 'territory or possession of the United States' does not reveal anything pertinent to the instant problem. Since these bases were secured from the British subsequent

to the passage of the Act, the particular problem under consideration did not then exist." * * *

"I believe that a determination regarding the status of these leased lands lies outside the province of the Wage and Hour and Public Contracts Divisions, and until the question has been settled by court decisions, congressional or executive acts, or interpretations issued by the State Department or other proper governmental agencies, the Divisions are not in a position to assert whether the Fair Labor Standards Act applies to employees at bases leased from the British.

"I regret that the nature of your problem is such that I can not give you a more definite answer * * * "

In the second place if the Court finds that the Statute is applicable, the rulings of the Administrative Agency to the contrary cannot stand in the way of according laborers the rights guaranteed to them by the Fair Labor Standards Act (See *Bay Ridge Operating Co.* v. *Aaron*, — U. S. — , 68 S. Ct. 1186.) Significantly the Wage and Hour Division has not intervened in support of petitioners' position herein. The Solicitor General's intervention herein appears to be at the instance of the State Department, which concluded that the Circuit Court in determining the issues between the private parties hereto had decided a political question affecting our foreign relations (Mem. on behalf of U. S. in support of Pet. for Cert. pp. 7-8):

B.

The Wage and Hour Division did, however, in its rulings, include the Panama Canal Zone within the coverage of the phrase "Territory or possession" in the Act. The fact that the Wage and Hour Division specifically included the Canal Zone indicates however that its view of the intended coverage of the Act is not the narrow one urged by the petitioners. For, if, as petitioners urge, that absolute sovereignty based upon acquisition by outright cession or

conquest is required the inclusion of the Canal Zone by the Wage and Hour Division is definitely improper.

It is unnecessary to enter here into a detailed examination or discussion of the terms and conditions covering the rights and interests of the United States in the Canal Zone as does the opposition. For present purposes, it is sufficient to point out that the Canal Zone was not absolutely ceded to the United States. The United States acquired only a grant of that territory for a specific and limited purpose accompanied by a grant of all necessary and essential authority in that area for carrying out that purpose. The situation with respect to the Leased Areas involved in the case at bar is clearly analogous. For here also the United States acquired a grant of territory for a specific and limited purpose accompanied by a grant of all necessary essential authority for carrying out that purpose. The fact that the grant of Canal Zone is in perpetuity while the grant here is for 99 years does not alter the basic fact that the two grants are of a similar nature. Hence, if the Canal Zone is a "Territory or possession" within the Act, so, also, is the Leased Area.

Furthermore in *Wilson* v. *Shaw*, 204 U. S. 24, 33, this Court held that for carrying out the purposes of the Canal Zone grant such Zone is a territory of the United States. It can hardly be suggested that the purposes for which the Leased Area was acquired are any less important to the defense and welfare of the United States than the Panama Canal. Indeed in these days of air warfare, the Leased Areas are essential to the protection of Panama Canal itself. Under the circumstances, it is therefore "hypercritical" (*Wilson* v. *Shaw*, *supra*, at p. 33) to contend that these Leased Areas are not "Territory or possession" of the United States.

C.

The opposing briefs urge that a territory or possession of this country can only be obtained by outright cession or by conquest, and they point to the fact that historically that is

the manner in which we have acquired territories and possessions (Pet. Br., pp. 10-12, 17-19). This overlooks the fact that in this century the concept of international relations has altered that traditional method of acquiring territory by outright cession or by conquest. For our national defense we required the areas leased to us by Great Britain. In an earlier era a country as powerful as the United States might well have acquired these areas as like areas were taken by other nations, through force and conquest, as for example, the case of Gibraltar, Malta, Cyprus, Rhodes *et cetera*. Had these Leased Areas been acquired in this manner then the petitioners would not find any reason for holding the Fair Labor Standards Act inapplicable. Can it be said that because we acquired these Leased Areas, to quote from the Agreement itself, "in a spirit of good neighbourliness between the Government of the United States of America and the Government of the United Kingdom" (55 Stat. 1560) that the said Areas are not "Territories or possessions" of the United States within which the objectives of the Fair Labor Standards Act may be carried out?

The precise legal effect of leases between nations has received consideration by authorities in the field of International Law. T. J. Lawrence in his treatise on *Principles of International Law* (6th Ed. 1915, pp. 175-177) indicates that the effect of these leases is greater than what is usually intended by "lease" in private law where "both lease and usufruct imply that property continues to belong to the grantor, while the grantee has the use and benefit of it for the time and under conditions fixed in the grant," concluding (p. 176):

> "* * * for all purposes of war and neutrality leased territory must be regarded as a part of the dominion of the power that exercises full control over it. In fact, the attempt to separate property or sovereignty on the one hand from possession on the other, by the use of phrases taken from the law of lease or usu-

fruct, is in its nature very deceptive. The terms in question are mere diplomatic devices for veiling in decent words the hard fact of territorial cession."

Status of the leased territory must be decided by reference to fundamental principles and by terms of the contract. (See note on *Lease of Chinese Territory to Germany,* Wilson in 1902 Int. Law Sit. Naval War College, p. 28.) Charles G. Fenwick in his work on *International Law* (1924) states (at p. 243):

> "Within recent years states have frequently resorted to long term leases as a means of securing control of territory, without prejudicing the formal sovereignty of the lessor state * * * it would seem that the sovereignty of the lessor state over the territory is more nominal than real."

This author considers the treaty covering the Panama Canal Zone to be in the nature of a lease.

On page 15 of petitioners' brief there appears a quotation that "sovereignty is regarded 'too important a matter' to pass with a lease." A reading of the editorial from which the quotation was taken (George Grafton Wilson, *Leased Territories* (1940), 34 Am. J. Int. Law, p. 704) reveals that this comment was made by a representative of Japan and was not in line with the conclusions reached by other nations. The statement as made by petitioners is out of context and clearly misleading. It was made by a Japanese minister in connection with lease of Port Arthur by China to Russia for a period of 100 years. The cited editorial, at page 703, reads in part as follows:

> "* * * When the general question became acute in 1900, the Minister of the United States in China reported to Secretary Hay: 'I have conferred with the English, German, Russian, French, Spanish, Netherlands and Japanese ministers, and all of them, except the Japanese, say that control over all of these

> leased ports has, during the existence of the lease, passed as absolutely away as if the territory had been sold outright * * * ' After much correspondence, Secretary Hay concluded that the effect of China's foreign leases was the 'relinquishment by China during the term of the leases and the conferment upon the foreign Powers of all jurisdiction over the territory.'"

And the editorial concludes with the following statement part of which petitioners quoted:

> "Sometimes the distinction between transfer of sovereignty and a lease by international convention differs little in actual operation; but, as the Japanese claimed in 1900, 'sovereignty is too important a matter to pass thus with a lease.'"

(See also the recent discussion entitled *On Relative Sovereignty*, Hans Aufricht, 30 Cornell L. Q. 137, 154; Wilson, *Handbook on International Law* (1939) 93, where author ostensively considers legal status of Canal Zone as based upon a lease.)

There is no question that a nation that acquires a lease on foreign territory for but a limited purpose is entitled to exercise "those rights of territorial jurisdiction which are expressly conferred by the underlying agreement" (30 Cornell L. Q. 154). That the United States has that territorial jurisdiction over commerce within the Areas leased to it by Britain cannot be questioned or denied. It is submitted, therefore, that the Fair Labor Standards Act which is an exercise of the authority of Congress over commerce to the full extent of its power in that field is effective in the Leased Areas and that such Areas are a "Territory or possession" within the purview of the Act.

CONCLUSION.

IT IS RESPECTFULLY SUBMITTED THAT, FOR THE REASONS SET FORTH, THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED.

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